

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

AMEREN ILLINOIS COMPANY	)	
d/b/a Ameren Illinois, Petitioner	)	
	)	Docket No. 12-0244
Smart Grid Advanced Metering	)	
Infrastructure Deployment Plan.	)	

**REPLY IN SUPPORT OF MOTION OF  
AMEREN ILLINOIS COMPANY TO STRIKE SECTION III  
OF OFFICE OF THE ATTORNEY GENERAL’S INITIAL BRIEF**

The AG seems to be under the delusion that “Anything Goes” on rehearing. It can propose whatever modifications to the revised Advanced Metering Infrastructure (AMI) Plan it wants. And it can wait until its Initial Brief on rehearing to explain why the Commission should order those modifications. It can’t. The Commission’s rules and prior cases on the scope of rehearing say it can’t. And principles of due process say it can’t. The Commission should give no consideration to the AG’s “fallback request” and exclude its proposal from the record.

The scope of this rehearing was defined by Ameren Illinois Company’s (AIC) petition for rehearing. The issue for consideration is whether implementation of its AMI Plan, as revised on rehearing, is cost-beneficial. Whether the Plan meets other statutory informational requirements, such as the requirement that the Plan contains metrics and milestones and AIC’s approach to customer education, has been settled. The AG’s “fallback request” to attempt to re-litigate those informational requirements is not “inextricably linked” to the cost-beneficial issue. It is a conditional modification to the Plan – proposed for the first time on rehearing and explained for the first time in the AG’s rehearing brief – that directly relates to informational requirements the Commission already reviewed. That AIC “could have” moved to strike Mr. Hornby’s testimony is irrelevant. That the Plan was not approved similarly did not open the door to a second review and approval of the statutory informational requirements. If the AG – and indeed, AIC as well –

cannot appeal the AG's "fallback request," because it was not included in a rehearing petition, the Commission certainly cannot rehear it. It strains logic to argue that a proposal never litigated in the underlying proceeding and never addressed in a rehearing petition can now be "reheard."

Likewise, the AG cannot prop up its "fallback request" after the record has been marked heard and taken. Post-hearing briefing is not an opportunity to cure a defect in a party's proposal. The AG was required to offer the explanation it offered in its Initial Brief in its testimony. AIC was not obligated to ask the right questions to discover that explanation. The failure to disclose and support its proposed modifications to the Plan until after the record was closed took away AIC's right to confront Mr. Hornby on the explanation for the "fallback request" offered for the first time in AG's Initial Brief. Giving consideration to the "fallback request," absent allowing AIC an opportunity to confront the AG's on its merits, would violate AIC's due process rights.

**I. THE AG'S "FALLBACK REQUEST" IS BEYOND THE SCOPE OF REHEARING, AS DEFINED AND LIMITED BY AIC'S PETITION.**

**A. Rehearing Was Sought And Granted On Issue Of Whether The Plan Will Be Cost Beneficial. No Other Issues Are Properly The Subject Of Rehearing.**

In the May 29, 2012 order, the Commission, after reviewing the record, found "Ameren's AMI Plan contains the five required elements set forth in Section 16-108.6(c)(1)-(5) of the Act and is compliant with that Section." Ameren Ill. Co., Docket 12-0244, Order (May 29, 2012), p. 59. That included the requirement the Plan have annual milestones and metrics, which the Commission found the Plan "adequately addresses." Id., p. 25. And it included the requirement the Plan address consumer education, which the Commission found the Plan provides "sufficient detail." Id. Whether the AMI Plan meets those informational statutory requirements is resolved.

The only issue not resolved is whether the Plan satisfies the sole remaining statutory requirement: "the cost-beneficial standard as defined in Section 16-108.6 of the Act." Id., p. 52. In the May 29, 2012 order, the Commission was troubled by what it considered several flawed

assumptions in AIC's Cost/Benefit analysis. Ultimately, it could not conclude the Plan "complies with the requirement that such plan will be cost beneficial as defined in Section 16-108.6(a) of the Act." *Id.*, p. 59. AIC is back on rehearing to clear that last hurdle for approval.

On June 28, 2012, AIC petitioned the Commission to approve a revised AMI Plan that addressed "the Commission's concerns regarding the [Plan's] cost-benefit analysis." (Petition for Rehearing, p. 4.) It did not seek rehearing on any other Plan requirements, because there were no other requirements to satisfy. The Administrative Law Judges (ALJs) recommended granting AIC's rehearing petition to "allow the Commission to consider additional evidence to evaluate the Revised Plan, either as filed or with modifications, meets the cost-beneficial standard contained in the Act." (July 2, 2012 ALJ Memorandum to Commission.) No other party sought rehearing on other portions of the Plan, other Plan requirements, or any other issues whatsoever.

**B. The Scope of Rehearing Is Limited To The Specific Issue For Which AIC Sought And Was Granted Rehearing, Not Any Issue The AG Wants to Brief.**

The Commission's rules require that "[a]pplications for rehearing must state with specificity the issues for which rehearing is sought." 83 Ill. Adm. Code § 200.880(b). In turn, the specific issues in the rehearing application define the scope of rehearing. *See, e.g., Citizens Util. Bd.*, Dockets 00-0620/0621 (Cons.), Order on Rehearing, 2002 Ill. PUC LEXIS 16, \*1-2 (Jan. 3, 2002) (limiting scope of rehearing to three specific issues raised in utility's petition); *Verizon North Inc.*, Dockets 00-0511/0512 (Cons.), Order on Rehearing, 2001 Ill. PUC LEXIS 1039, \*3-4, 11 (Nov. 29, 2001) (limiting scope of rehearing to two issues based on utility's petition). This is no different from how the application for rehearing defines the breadth of any appeal. 220 ILCS 5/10-113(a) ("No person or corporation in any appeal shall urge or rely upon any grounds not set forth in such application for a rehearing before the Commission."). As with

the appeal of any Commission order, the scope of the issues that can be addressed on rehearing is determined by the party's application for rehearing, not by the party's testimony or brief. If the AG and AIC cannot appeal its "fallback request," how can it properly be a subject of rehearing?

In Docket No. 00-0393, the utility argued a tariff modification proposed on rehearing was beyond the scope of rehearing because no party sought rehearing on that matter or otherwise requested that the Commission address it. Illinois Bell Tele. Co., Docket 00-0393, Order on Rehearing, 2002 Ill. PUC LEXIS 362, \*127-28 (Mar. 28, 2002). The Commission agreed, finding the tariff modification was beyond the scope of rehearing. Id. \*186-87. The AG's "fallback request" is no different. It seeks to impose on AIC tracking, outreach and reporting requirements, which were not imposed by the Commission and which the AG did not seek rehearing to impose. The AG could have raised its concerns about the original Plan. It did not. It could have sought rehearing to have its concerns addressed. It did not. It cannot now present these proposals in its initial brief on rehearing, after the scope of rehearing already has been set.

**C. The AG's "Fallback Request" Is A Modification To The Plan Outside The Scope Of Rehearing.**

The AG attempts to claim that its "fallback request" is "inextricably linked" to its expert's analysis of AIC's Cost/Benefit analysis. (AG Resp. 7.) But the fact that the AG calls its proposal a "fallback request" shows that it has nothing to do with whether implementation of the Plan will be cost-beneficial. The "fallback request" assumes the Commission finds the Plan meets the statutory cost-beneficial requirement. These are items the AG wants the Commission to order, if the Plan is found to be cost-beneficial. Moreover, these items (i.e., "the same metrics, and stakeholder outreach ... as well as same reporting requirements" ordered in Docket No. 12-0298) are "inextricably linked" to other statutory Plan requirements AIC already has satisfied. The AG's attempt to cast its "fallback request" as part of the cost-beneficial test is not credible.

The Commission's order granting of rehearing in Docket No. 12-0298, the proceeding to approve the AMI Plan of Commonwealth Edison Co. (ComEd), is instructive. In that docket, the Commission granted ComEd's petition for rehearing, in part, and denied it, in part. (ComEd's Petition for Rehearing, Docket 12-0298, July 6, 2012, pp. 2-3; ICC Bench Meeting Minutes, pp. 50-52.) Specifically, the Commission granted ComEd's request to have rehearing on the issue of the deployment schedule, but denied ComEd's request to rehear the "door knock" and metrics modifications proposed by the AG that the Commission approved in its June 22, 2012 final order – the very same metrics the AG now wants the Commission to impose on AIC for the first time on rehearing. The Commission considered those modifications to be separate issues, not "inextricably linked" to other statutory Plan requirements, in ComEd's proceeding. The same consideration should be given here. If ComEd were to now propose the Commission revise those findings in its rehearing order in that docket just because another Plan requirement was under consideration, the AG would be the first to "scream bloody murder."

**D. That AIC Did Not Strike Mr. Hornby's Testimony Is Irrelevant. The Admission Of Evidence Does Not Expand The Scope Of Rehearing.**

The AG also claims AIC "could have filed a motion to strike" Mr. Hornby's "fallback" proposal. (AG Resp. 6-7.) Yes, AIC could have done that. But the fact that AIC "chose not to avail itself of [the] opportunity" to strike a portion of Mr. Hornby's testimony is irrelevant. The evidence admitted into the record on rehearing does not define the scope of rehearing. The rehearing petitions and the Commission's order granting rehearing define the scope of rehearing. It is undisputed that issues of the Plan's metrics, customer outreach and reporting requirements were not part of any rehearing application or any Commission order granting rehearing.

Nor did AIC waive its objection to the AG's "fallback request" by failing to move to strike a portion of Mr. Hornby's testimony. If an issue is not properly subject to rehearing, the

Commission should not consider it, even if a truckload of evidence in support gets admitted into the record. The AG’s “gotcha argument” should not be given any consideration. The only party who missed an “opportunity” is the AG. Its failure to seek rehearing on its “fallback request” – indeed its failure to raise the issue in the original proceeding – should not be laid at AIC’s feet.

**E. That the Plan Was Not Approved Did Not “Hit The Reset Button” On Reviewing And Approving All Aspects Of The AMI Plan A Second Time.**

The AG also suggests everything is “fair game” for rehearing because the Commission failed to approve the Plan in the underlying proceeding. The AG’s argument that “the Commission specifically rejected the [AIC] AMI Plan as a whole” is simply not true. As explained above, the Commission specifically found the Plan satisfied the very informational requirements on metrics and consumer education that the AG now seeks to have reheard. That the Plan did not meet one requirement, the cost-beneficial standard, does not reopen the door to rehearing on all the statutory requirements, just as not approving a utility’s requested revenue requirement would not mean that all adjustments are back on the table on rehearing. The AG was obligated to seek rehearing on those requirements to introduce its “fallback request” that it seemingly forgot to include the first time around. And the Commission needed to grant the request. Neither happened. That the Commission granted rehearing on the cost-beneficial requirement does not mean we are back at square one; nor does it give the AG a second chance.

**II. THE AG’S “FALLBACK” PROPOSAL WAS NOT FULLY IDENTIFIED AND SUPPORTED IN TESTIMONY.**

**A. The AG Does Not Dispute That AIC Is Afforded The Right To Confront The Evidence And Witnesses That Support Claims Brought Against The Utility.**

As AIC explained in its Motion, due process in administrative proceedings requires “the opportunity to be heard” and “the right to cross-examine adverse witnesses.” Gigger v. Bd. of Fire & Police Comm’rs of City of East St. Louis, 23 Ill. App. 2d 433, 439 (4th Dist 1959); see

also Abrahamson v. Ill. Dep't of Prof'l Reg., 153 Ill. 2d 76, 95 (1992); Balmoral Racing Club, Inc. v. Ill. Racing Bd., 151 Ill. 2d 367, 400-01 (1992) (“cross-examination is required in order to ensure that due process requirements are met”). As AIC also explained, the Commission consistently has found that consideration of evidence, without allowing an opposing party the opportunity to cross-examine or respond, contravenes due process. See, e.g., Illinois Commerce Comm’n v. Ill. Gas Co., Docket 02-0170, Order, 2003 Ill. PUC LEXIS 682, \*35-36 (Aug. 6, 2003) (no consideration given to expert qualifications submitted for the first time in reply brief on exceptions); Illinois Bell Tel. Co., Docket 00-0260, Order, 2001 Ill. PUC LEXIS 871, \*20-21 (Sept. 12, 2001) (auditor’s participation in proceeding critical to afford parties opportunity to present and cross-examine witnesses relative to the issue of tracking merger related costs in order for due process concerns to be satisfied); Commonwealth Edison Co., Docket 92-0121, Order, 1995 Ill. PUC LEXIS 232, \*25-26 (Apr. 12, 1995) (no consideration given to proposal offered after evidentiary hearing concluded without benefit of fundamental right to cross-examination by the other parties); Illinois Commerce Comm’n, Docket 94-0066, Order, 1995 Ill. PUC LEXIS 176, \*266-68 (Feb. 23, 1995) (late introduction of Staff’s new modifications proposed for the first time in brief, which were not tested in cross-examination and which no party had the opportunity to address for the record, would violate fundamental fairness and abridge other parties’ due process). The AG’s Response does not contest the precedent of prior court and Commission opinions that both recognize the rights afforded AIC and the remedy to protect those rights, namely the exclusion or lack of consideration of late-offered evidence.

**B. The AG’s Response Admits That It Did Not Explain Its “Fallback Request” Until Its Initial Brief.**

The AG’s Response admits that it waited until its brief to explain its “fallback request.” (See, e.g., AG Resp., p. 4 (“The People made clear in their brief the reasons why it was

appropriate to adopt the same modifications to the metrics and filing requirements....”); AG Resp., p. 5 (“As the People discussed in their Initial Brief, these same concerns apply to this docket....”).) AIC does not dispute that the AG’s Initial Brief explained its “fallback request.” That is very reason this Motion was filed. AIC testified on rebuttal that the proposal was vague and undefined and did not explain why AIC should be subject to the same requirements ordered in the ComEd proceeding. The AG tried to cure that defect and explain the rationale for its adjustments in its Initial Brief. The briefing process, however, is not an opportunity to cure a party’s failure to properly identify and support its claims and positions.

**C. The AG’s Defense – That AIC Failed To Ask The Right Questions – Does Not Excuse The AG’s Failure To Identify And Support Its Modifications.**

The AG claims that AIC was not denied the rights it is afforded as a litigant, namely its right to confront and cross-examine opposing witnesses on their opinions and recommendations, because it could have asked questions in discovery or at the hearing. The questions that AIC could have asked is irrelevant to the issue whether the AG has properly disclosed its expert testimony. It is not AIC’s responsibility to flesh out the AG’s proposals through discovery and at the evidentiary hearing. If that were the case, in rate proceedings, the AG could submit direct testimony that simply advocates an adjustment of a certain amount, and it would be up to AIC to inquire as to the basis for the adjustment and why it is applicable. That is not the proper procedure for a contested administrative proceeding in front of the Commission.

The AG was obligated to explain its proposal in testimony. It is not permissible for that explanation to be offered for the first time on brief. AIC was not obligated to ask Mr. Hornby what he meant. That AIC did not do the AG’s legwork to discover what Mr. Hornby meant does not give the AG a free pass to prop up its “fallback request” in briefing. The Commission should give no consideration to the AG’s defense that AIC should have asked the right questions. It is

the AG's burden to identify and support its proposed modification. A vague proposal – like a bare-bones complaint – does not satisfy that burden or principles of due process. And like a complaint that is not well pled, the Commission should effectively dismiss the AG's proposal.

**D. The Record Of Another Proceeding, To Which AIC Was Not A Party, Does Not Cure The AG's Failure To Identify And Support Its Modifications.**

Underlying AG's rationale for waiting until its Initial Brief to offer its support for the "fallback request" is the notion that, just because the Commission imposed certain requirements on ComEd in another proceeding, it is appropriate for the Commission to impose the same requirements on AIC, without providing AIC an opportunity to contest the requirements. The notions of due process and fair play do not fade into the background simply because the Commission sees merit in "consistency" in its treatment of utilities. The appropriate forum for the Commission to set rules and requirements that apply to all utilities participating in formula rates would be, in fact, a rulemaking. That would have allowed AIC the opportunity to contest the reasonableness and applicability of the requirements imposed on ComEd. Absent the opportunity and protection of its rights that a rulemaking proceeding would have afforded AIC, it is not appropriate for the Commission to impose requirements on AIC based solely on the record in the ComEd proceeding to approve its AMI Plan. That ComEd had a chance to litigate these requirements does not mean that AIC does not need to be afforded that same right.

**III. CONCLUSION**

For the reasons set forth in AIC's Motion and this Reply, the Commission should give no consideration to the AG's "fallback request" and exclude Section III of its Initial Brief on Rehearing from the record. For similar reasons, the Commission also should exclude Section III.a of the AG's Reply Brief on Rehearing.

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Respectfully submitted,

AMEREN ILLINOIS COMPANY

By: /s/ Mark A. Whitt

One of their attorneys

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**CERTIFICATE OF SERVICE**

I, Mark A. Whitt, certify that on October 12, 2012, I caused to be served a copy of the foregoing *Reply in Support of Motion of Ameren Illinois Company To Strike Section III of Office of the Attorney General's Initial Brief* by electronic mail to the individuals on the Commission's Service List for Docket No. 12-0244.

/s/ Mark A. Whitt

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